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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Joint written statement* submitted by Europe-Third World Centre, World Confederation of Labour, non-governmental organisations in general consultative status, American Association of Jurists, Centro de Estudios Europeos, Commission for the Defense of Human Rights in Central America, France Libertés : Fondation Danielle Mitterrand, Indian Movement "Tupaj Amaru", International League for the Rights and Liberation of Peoples, Union of Arab Jurists, Women's International League for Peace and Freedom, non-governmental organisations in special consultative status, International Educational Development, Movement against Racism and for Friendship among Peoples and World Peace Council, non-governmental organisations on the Roster

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[5 July 2002]

*This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).



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Working Group on the Working Methods and Activities of Transnational Corporations of the United Nations Sub-Commission on the Promotion and Protection of Human Rights: at an impasse

1. On a document submitted to the Sub-Commission on the Promotion and Protection of Human Rights in 2001 (E/CN.4/Sub.2/2001/NGO/21. Activities of the Working Group on Transnational Corporations of the Sub-Commission on the Promotion and Protection of Human Rights), the American Association of Jurists and the Centre Europe Third World stated:

« ... The Working Group has dedicated a great part of its time in meetings to examining a project of directives for a voluntary code of conduct of the transnational corporations, presented by the United States member of the group, Mr. David Weissbrodt, entitled « Draft Universal Guideline for Companies », for which the last version is dated May 21, 2001. This does not appear to be part of the mandate of the Working Group. At best, it stems from a highly controversial interpretation of the mandate. ... »

2. The above-described situation still persists. The novelty is that in February 2002 the Working Group held a non-official, confidential meeting, called by the United States member of the Working Group, Mr. Weissbrodt with the sole aim to examine a new version of his project, this time entitled « Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises » (E/CN.4/Sub.2/2002/WG.2/WP.1/Add.2). The new project is not only a clear denaturalisation of the Working Group's mandate but a significant step backwards on the current state of international humans rights law.

The Major Features of Mr. Weissbrodt's New Project

A. Non-compliance with the objective of the Working Group's mandate

3. Mr. Weissbrodt's project is destined to transnational corporations and to « other business enterprises ». The latter defined by the author as « any business entity, regardless of the international or domestic nature of its activities ». This definition cannot be understood as referring only to transnational corporations' subsidiaries or subcontractor companies (which, certainly fall within the Working Group's area of study) but as regarding any kind of enterprise operating at a domestic level regardless of its dimension.
4. Thus it fails to comply with the objective of the study given to the Group, namely, to pay attention to transnational corporations, as a worldwide specific phenomenon of enormous economic, social and political significance, with evident effects upon the enjoyment of human rights on a planetary scale. Certainly, the Sub-Commission, when conferring the mandate upon the Working Group in 1998¹, had no intention to charge the Group the task to pay attention to little companies only operating at home.
5. Apart from non-compliance with the Working Group's objective of the study, Mr. Weissbrodt's project does not tackle at all the effects on fundamental human rights which can derive only from transnational corporations' activities, given their worldwide power:
 - a) on the right to peace;
 - b) on the right to access to essential public services;

¹ See the Resolution 2001/3 of the Sub-Commission.

- c) on the right to free access to knowledge which are social by nature;
 - d) on the right to freedom of communication, information, opinion and expression;
 - e) on the right to a real representative and participative democracy.
6. The Project, notwithstanding, in paragraphs 1 to 15, deals with various significant aspects regarding the activities of transnational corporations and other enterprises that affect, or may affect, human rights but, as will be considered later in B and C, without proposing any efficient protection system to these rights.
7. In the penultimate paragraph of the Preamble of Mr. Weissbrodt's project, it is stated that officers and workers of the enterprises have responsibilities regarding this Declaration of Principles. To include workers (who have no decision-making power in the heart of the enterprise, and often have not even a negotiating power) amongst those who are responsible is a way of diluting or deviating from the issue of civil and penal responsibility of transnational corporations as legal persons and of their officers (physical persons) who take the decisions, unless we want, for instance, to make them responsible for the lung problems of young women working in conditions of semi-slavery for subcontractors to Nike in some Asian countries; or to make the workers of Enron, who lost their jobs and their money for retirement, responsible for criminal activities carried out by officers of that enterprise which led to such a result.

B. The project gives a subordinate and secondary role to national and international operative standards; it actually ignores their binding character for transnational corporations.

8. From the Project as a whole arises the purpose of the Working Group passing a declaration of principles (and thus, not binding) for transnational corporations to be implemented with private and volunteer codes of conduct, what means, within its scope, a big step backwards in international human rights law, for it is intended to ignore that the whole of international human rights law currently in force (not exhaustively enumerated in the preamble of the project) is a prescriptive and binding law for physical as well as legal, whether public or private, persons, including transnational corporations.
9. Cheriff Bassiouni says that there are five successive stages in the progressive development of human rights: 1) enunciative (the emergency of certain common values perceived internationally); 2) declarative (the declaration on an international document or instrument of certain interests or human rights identified as such); 3) prescriptive (a wording of those rights on international instruments - general or specific - or on binding conventions); 4) implementation (search for or development of ways of implementation) and 5) criminalisation (development of international penal prescriptions aiming at the protection of such rights against its possible violation).²
10. Mr. Weissbrodt intends to take back, for transnational corporations, the current stage of international human rights law, prescriptive and binding, to the declarative stage. The latter has not the legal effects due to current legal standards (domestic and international) namely, to be exigible and to bring a sanction in case of non-observance.
11. There are not legal nor rational grounds to:
- a) establish an specific list of human rights that should be respected by transnational corporations and not to simply establish that transnational corporations must respect,

² Cheriff Bassiouni, *International Criminal Law and Human Rights*, Transnational Publishers, New York, vol. I, pp. 16 and 17.

like persons, all human rights and all legal standards currently in force, particularly those concerned with their activities (industrial, financial, services, and so on) and

- b) take back to the declarative stage (that is, non demanding and non punishable), particularly for transnational corporations, legal standards that are currently in force (that is, binding for all and whose transgression brings a sanction).
12. This evaluation of the project can be confirmed with the reading of some of its paragraphs and the Introduction and Comments. In the Introduction, for instance:
- « The Human Rights Principles and the related Commentary represent an effort to establish standards for business conduct which will assist transnational corporation and other business enterprises to be good world, national and local citizens »
(E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1, par. 24).
13. Paragraph 30 states that, given that the Sub-Commission asked the Working Group to contribute to the drafting of binding standards, the Group decided (unofficially, at the meeting held in February 2002) to draft a Declaration of Principles (which is non-binding, as it has been pointed out above).
14. Paragraph 32 states that the Principles « are not only intended to contribute to the drafting of binding standards... », etc. In other words, along the text, there are references to future binding standards, as if they did not already exist, and it talks about a progressive and volunteer implementation of some of the principles, as if the already existing standards were not binding and immediately applicable to transnational corporations.
- C. In Mr. Weissbrodt's project private initiatives are privileged and the state is given a secondary role in the implementation of standards and the monitoring of this implementation
15. The first sentence of paragraph 1 of the Project is a general statement about the « primary responsibility » of the State to respect and make respect human rights. But this general statement is not applicable to the general context of the Project, where the « primary responsibility » of the State disappears, or at best carries out a subsidiary role, regarding transnational corporations.
16. The commentary of paragraph 4 of the Project, (« security arrangements ») states that transnational corporations and their officers shall observe international human rights standards, the U.N. Principles on the Use of force and Firearms; and the U.N. Code of Conduct for Law Enforcement Officers. This is an attempt to legitimate private militias in the enterprises. The same commentary to paragraph 4 foresees business security arrangements between enterprises and State military forces; thus, such armed forces would become a private service paid by the enterprises. This is what happens in Colombia, where British Petroleum has recognised rewarding the Armed Forces. This approach implies the prevention of the state from having monopoly over the use of force and to subordinate its armed forces to private interests.
17. The last part of the Project (« General Provisions of Implementation ») states:
- a) that, as a first step to implement the Principles, enterprises will adopt internal rules according to the Principles;
 - b) that enterprises will be subject to periodic monitoring by national, international, governmental, and/or non-governmental mechanisms and that enterprises will themselves conduct periodic evaluations concerning their own activities.
18. Paragraph 34 of the Introduction of the Project, clears up any possible doubt as regards the secondary role given to the State, because it is placed as the sixth in the enumeration of those who will implement the Project, should it be approved, after transnational

corporations themselves, business groups or trade associations, unions, NGOs and intergovernmental organisations. The United Nations is in the seventh and last place.

19. Thus it becomes clear that the implementation of the Principles is not entrusted, as it should by a Declaration that has originated in the United Nations, firstly to states, which are responsible for assuring the law enforcement within each national territory, but to the enterprises themselves and to other private entities, except for a monitoring which could be optionally carried out by the State (governmental and/or non-governmental, reads the Project).
20. In this Project, the State and its institutions, such as justice and security forces, perform a secondary and subordinated function with respect to the private sector.
21. The American Association of Jurists and the Centre Europe-Third World have already pointed out in other documents, citing several studies, the little efficiency of voluntary codes and the private external monitoring systems' doubtful effectiveness. The latter are often fraudulent, as shown by some monitoring carried out by transnational corporations, such as, Arthur Andersen in the Enron case and Pricewaterhouse Coopers, in the Gazprom case, whose activities are currently under enquiry by Justice.
22. The approval of Mr. Weissbrodt's project would legitimise, by means of an international document, a current situation which consists of big transnational corporations acting with total impunity, placing themselves above any norm regarding human rights, as well as above national and international institutions which are bound to enforce such standards.
23. Mr. Weissbrodt seems to adhere professor Coase's « alternative paradigm », contending that enterprises watch themselves and be not obliged to respect « artificially created » models. In other words, the Universal Declaration, the Covenants and International Conventions and eventually binding codes of conduct would be « artificial creations ». Instead, free market, businesses and profits, in a word « the market's invisible hand » are, just as the rule of universal gravitation, « natural laws », which must have priority over « artificial creations ».
24. The Working Group should turn down Mr. Weissbrodt's project and try to recover lost time and tackle with no further delay the mandate conferred to it by the Sub-Commission. The Working Group should study and make recommendations to states and to the international community on ways and means to get transnational corporations submitted to the law in force, on how to improve and complete standards so as to reach that goal and on how to get these companies punished when they violate domestic or international law.
